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IN THE
Supreme Court of the United States
October Term, 1992

WILLIAM DAUBERT AND JOYCE DAUBERT, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR JASON DAUBERT, AND ANITA DE YOUNG, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR ERIC SCHULLER,
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Merrell's extravagant verbal invective and *ad hominem* attacks on petitioners' experts cannot obscure the square holding below that federal judges may use the *Frye* test and a related "peer review requirement" to screen and exclude scientific conclusions not "generally accepted" within a judicially defined scientific community. Petitioners and several circuits disagree with the Ninth Circuit's approach and contend that both *ad hoc* tests are foreclosed by the express language and underlying policies of the Federal Rules of Evidence. All three issues posed — the appropriateness of the *Frye* rule, the permissibility of judicial imposition of additional substantive burdens on expert testimony in general, and the permissibility of a "publish-or-perish" peer review requirement under the Federal Rules of Evidence — are cleanly presented, are purely legal in nature, and merit this Court's review.

1. Certiorari is Warranted to Resolve the Circuit Conflict on the *Frye* Issue.

Merrell does not and cannot dispute the existence of a circuit conflict over whether federal judges may use the *Frye* test to screen out expert scientific testimony based on a conclusion that it is not "generally accepted" by the relevant scientific community. Indeed, Judge Becker of the Third Circuit, in a comprehensive discussion of the Federal Rules of Evidence, recently characterized "the standard for admitting novel scientific testimony" as "the most controversial and important unresolved question in the Federal Rules." Becker & Orenstein, *The Federal Rules of Evidence After Sixteen Years — The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 863 (1992) (hereinafter "Becker"). *See also id.* at 876-79 (discussing nature of the *Frye* issue).

In March 1992, this Court evidently deemed the Fifth Circuit's decision in *Christophersen v. Allied Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (per curiam), *cert. denied*, 112 S.Ct. 1280 (1992), to be an inappropriate vehicle for addressing the *Frye* issue. *See* Pet. 11-13.[1] In the scant six months since then, no fewer than three

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[1] Merrell's Opp. 1 n.1 ignores that "[t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times," *United States v. Carver*, 260 U.S. 482, 490 (1923), and is factually erroneous.

cases (including this one), all of which are now pending, have been presented to this Court on the *Frye* issue. *See Jakobetz v. United States*, No. 91-7921 (discussed in Pet. 14-16); *45/194 Kg. Drums of Pure Vegetable Oil v. United States*, No. 92-173.[2] Thus, the question for this Court is not *whether* to resolve the *Frye* conflict, but rather *which case* provides the most appropriate vehicle for a clear resolution. The Petition and this Reply demonstrate that this case is an entirely suitable vehicle.[3]

Evidently sensing the futility of completely denying a circuit split regarding *Frye*, Merrell instead claims that review should be denied in *this* case because petitioners allege harm resulting from Bendectin, and "[r]ules relied upon in Bendectin litigation are sound in that context, but not necessarily so in all others." Opp. 30. But Congress has not promulgated special evidence rules for Bendectin cases, and the suggestion that *Frye* might be applicable as a special rule only in Bendectin cases illustrates the *ad hoc* and unprincipled nature of the view underlying Merrell's position and the decision below. Merrell's cavalier claim is incompatible with Congress's central objective in enacting the Federal Rules of Evidence: to ensure the uniform application of evidence law in all federal cases. *See* Pet. 16. Here, "[c]ircuit splits are detrimental because they undermine the goal of uniformity that underlies the enactment of Federal Rules." Becker, *supra*, at 892.

Merrell also opposes review by arguing that, even if this Court were to adopt the approach followed by those circuits which reject *Frye*, the outcome in this case on remand would be the same —

[2] *Frye* was originally used in a limited criminal context, but since the Fifth Circuit's dramatic expansion of the "general acceptance" test to the civil arena in *Christophersen*, *see* Pet. 17 n.5, *Frye* has been applied in a broad variety of cases beyond criminal law. For example, courts have relied on *Frye* to exclude evidence in subject areas as diverse as state products liability law (this case), FDA regulations (*45/194 Kg. Drums of Pure Vegetable Oil*, *supra*), and federal liability under the FELA for injuries to railroad workers (*Eggar v. Burlington Northern R.R.*, 1991 U.S. Dist. LEXIS 19240, *8 (D. Mont. 1991)). Because roughly a third of all cases in the federal courts depend on expert testimony, *see* Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. Rev. 1, 1 (1988), the need for this Court's review of the *Frye* issue is particularly pressing.

[3] If this Court grants review in either of the other two cases, this Petition should at minimum be held pending disposition of the case granted review.

petitioners' expert testimony would be excluded. Opp. 12-14. This analysis is in error for at least three reasons:

First, petitioners do not ask this Court to adopt the law of any particular circuit or to rule on the precise facts of this case. They merely ask this Court to hold that the *Frye* rule was superseded by enactment of the Federal Rules of Evidence, confirming the view of the Solicitor General that Rule 702 "does not . . . suggest that the standard for admissibility of novel scientific evidence should be more stringent than the standard that applies to other forms of expert testimony." *See* Pet. 15-16. This Court need not fear that review would be factually complex; plainly, this Court can determine and articulate the meaning of the Federal Rules without extensive inquiry into the underlying scientific record or specific facts of this case. *See, e.g., Celotex v. Catrett*, 477 U.S. 317 (1986) (setting forth interpretation of Fed. R. Civ. P. 56 without inquiry into the complex record of underlying asbestos litigation).

Second, Merrell's prediction of how petitioners' expert evidence would fare under the current admissibility standards of the three circuits that have rejected *Frye* is both incomplete and totally speculative. The Opposition does not even venture a guess as to the result under the law of the Fourth Circuit, *see* Pet. 11 n.4. Merrell predicts that Second Circuit precedent would not "lead to a different result in a Bendectin case," Opp. 14, even though that Circuit has never addressed such a case.[4] The essential point is that each case will turn on its own facts and evidence; in the absence of *Frye*, there will not be automatic victories for plaintiffs or for defendants.

[4] As to the Third Circuit, which has addressed a Bendectin case, Merrell relies on the narrow and fact-specific holding in a district court remand without any showing of relevance to the instant case. Opp. 12-13. The district court in *DeLuca III* indeed applied the Third Circuit's *Downing* standard to exclude one expert's affidavit concerning Bendectin causation. However, as Merrell candidly notes, the expert in that case had no credentials "in the field upon which he primarily relied in formulating his opinion." Opp. 12. Ruling such testimony inadmissible is an unremarkable application of Rule 702, and it hardly dictates the outcome that would be reached in *this* case under the *Downing* standard. In this case petitioners presented eight highly qualified experts, none of whose qualifications Merrell challenged. (Merrell's statement that it "never conceded the qualifications of Petitioners' experts," Opp. 9, is a play on words; the important and undisputed point is that Merrell declined to challenge these experts' qualifications in its summary judgment motion.) Thus nothing in Third Circuit law requires the inadmissibility of petitioners' expert affidavits in this case.

Third, Merrell completely ignores petitioners' demonstration that, absent its *Frye* analysis, the Ninth Circuit would in fact require admission of petitioners' evidence. The district court utilized Fed. R. Evid. 703 to exclude petitioners' expert testimony because that testimony supposedly was not based on the "most reliable" data. Pet. 6 n.2. Petitioners' expert testimony did rely on "four standard sources of information" (Pet. 5) and, absent *Frye*, Ninth Circuit law does not authorize district judges to insist on the "*most* reliable" sources. Indeed, Merrell does not deny that the Ninth Circuit has consistently read Rule 703 to permit an expert to rely on "'any type of evidence commonly used in the field.'" Pet. 4 & n.1 (quoting *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1429-30 (9th Cir. 1991)). Thus, if this Court rules against use of the *Frye* test, on remand the Ninth Circuit would have no grounds — on the record of *this* case — to exclude petitioners' evidence.

Although it is in no way necessary for this Court — either at this stage or on the merits — to consider the factual context of the Bendectin litigation, that factual context actually argues *for* review because it illustrates a central criticism of the *Frye* rule. As petitioners have explained without rebuttal, Pet. 11 n.4, one of the chief faults of the *Frye* rule is that it is "too vague and malleable to yield consistent results." *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (3d Cir. 1990). *Frye* allows judges to determine the outcomes of cases by arbitrarily selecting a particular "scientific community" within which there is a "consensus." Using *Frye*, courts may "manipulate the parameters of the relevant 'scientific community' and the level of agreement needed for 'general acceptance'" to reach the results they desire. *United States v. Downing*, 753 F.2d 1224, 1236 (3d Cir. 1985). Worse, courts may accomplish such manipulation without ever engaging in an independent review of the factual record of the underlying claim. For example, the Ninth Circuit below simply relied on previous circuit court decisions involving the admissibility of Bendectin evidence on other records. (A3-A4). Such reliance on earlier cases, rather than on the evidence presented in *this* case, illustrates the Third Circuit's concern that *Frye* leads to an "uncritical acceptance of prior *judicial*, rather than scientific, opinion as a basis for finding 'general acceptance.'" *Id.* at 1236 (emphasis in original).

This case also perfectly illustrates the extreme malleability of the *Frye* rule by demonstrating that a court can construct its own "scientific consensus" simply by selectively excluding entire classes

of scientific data on a given issue. The Ninth Circuit below focused exclusively on epidemiological studies published in peer-reviewed journals. (A3 to A4). Using only these studies, the court determined that there was a "consensus" and that the views of petitioners' experts were not "generally accepted." In order to reach this conclusion, however, the Ninth Circuit was forced arbitrarily to reject animal and chemical studies as "insufficient to establish a link between Bendectin and birth defects." (A3 (citation omitted)).

Yet in another Bendectin case, the Sixth Circuit observed — only three months later — that "[a]nimal studies often comprise the backbone of evidence indicating biological hazards, and their legal value has been recognized by federal courts and agencies." *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992). Moreover, far from finding a "consensus" on Bendectin based on the extant epidemiological studies, the Sixth Circuit found that Merrell "overstates the power of these statistical studies," that Merrell's studies are "by no means conclusive," and that "[a]n analysis of this evidence demonstrates that it is possible that Bendectin causes birth defects even though these studies do not detect a significant association." *Id.* at 1357.[5] The context of this

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[5] Merrell's claim of "consensus arising from . . . repeated success for Merrell in Bendectin cases" is belied by the Sixth Circuit's emphasis on the "inconsistent results" nationwide: although "[f]our federal circuits have held that plaintiffs failed as a matter of law to establish causation," "other courts have either denied or reversed on appeal grants of summary judgment for [Merrell] in eight cases." *Turpin*, 959 F.2d at 1351-52. The lack of a consensus is concretely illustrated by the results of the 1985 multi-district common issues trial that resolved over 800 Bendectin cases, in which the Sixth Circuit observed that "the jury verdict following trial here might have been for the plaintiffs instead of for the defendant." *In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation*, 857 F.2d 290, 325 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989), *aff'g* 624 F. Supp. 1212, 1244 (S.D. Ohio 1985) ("[b]oth sides presented testimony of eminently qualified and highly credible experts who differed in regard to the safety of Bendectin"). Similarly, Chief Judge Rubin, the trial judge in the multi-district case, refused Merrell's request for summary judgment in other individual cases, stating that "the Court is convinced that there are genuine issues of fact which preclude entry of summary judgment." *In re Bendectin Products Litigation*, 732 F. Supp. 744, 749 (E.D. Mich. 1990). *See also Wilson v. Merrell Dow Pharmaceuticals, Inc.*, No. 83-C-710-E, slip op. at 1 (N.D. Okla. March 1, 1990) (finding that "[s]ubstantial scientific evidence exists to support both the conflicting arguments regarding causation"); *Longmore v. Merrell Dow Pharmaceuticals, Inc.*, 737 F. Supp. 1117, 1120 (D. Idaho 1990) (rejecting resort to supposedly "overwhelming" statistical data in order "to bulldoze aside the plaintiffs' experts").

The current status of Bendectin litigation thus reveals a *controversy*, not a "consensus," within the scientific community and the courts on causation.

case thus clearly illustrates the arbitrary results permitted by resort to the *ad hoc Frye* test, and to the extent this Court considers the underlying facts of this case at all, the fact that petitioners' claim involves Bendectin is an argument *for* review rather than against it.

2. Certiorari is Warranted on the Issue of Inherent Judicial Power.

The Ninth Circuit's use of the *Frye* test to screen out novel scientific evidence "is inconsistent with the letter and spirit of the Rules." Becker, *supra*, at 863. The plain language and history of the Federal Rules of Evidence indicate that such judge-made rules for exclusion of evidence are impermissible.

Merrell argues that the Federal Rules of Evidence do not "wipe clean the slate upon which the common law of evidence was, and is, written." Opp. 16-17. But that is a straw man. Petitioners simply maintain that federal courts have no inherent authority to *exclude* evidence that Congress has otherwise deemed admissible. Pet. 17-27. Merrell contends, in effect, that common-law exclusionary rules such as *Frye* haunt the federal courthouses until Congress statutorily exorcises each one, incanting its volume and page number from the Federal Reporter. But this position is not colorable given that Congress specifically listed *all* grounds for excluding evidence in Fed. R. Evid. 402. Pet. 19-20. In any event, Merrell's contention is an argument on the merits that only underscores the seriousness of the need for a definitive holding by this Court.

Although the court below *did not even cite* Fed. R. Evid. 104(a), Merrell — in another argument on the merits — asserts that the Ninth Circuit "correctly, albeit *implicitly*, recognizes the pivotal role that Rule 104(a) plays" in "encourag[ing] judicial use of [common-law exclusion] doctrines [such as *Frye*] to help lead trial courts" in determining the admissibility of scientific testimony. Opp. 20-21 (emphasis added). There are two problems with this argument. First, it was never articulated by the Ninth Circuit below. Second, this Court has squarely rejected any such construction of Rule 104(a). In *Bourjaily v. United States*, 483 U.S. 171 (1987), this Court repudiated the theory that Rule 104(a) provides a blank check for district judges to exclude otherwise admissible evidence using common-law doctrines which antedate the

Federal Rules of Evidence but are not repudiated therein *by name*.[6] Writing for the Court, Chief Justice Rehnquist also held that Congress was not required to issue legislative history confirming that Rule 104(a) means what it says. *See* Pet. 21-22; *cf. Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992).

In addition to departing from plain language, the court below enunciated a "general acceptance" standard that operates to extinguish the state-created tort rights of an entire class of litigants throughout the states of the Ninth Circuit. This holding is in clear disregard of this Court's *Erie* jurisprudence. Merrell argues (Opp. 23) — albeit incorrectly, *see* Pet. 25-26 & n.7 — that use of the *Frye* test yields the same result in this case as if it had been tried in California state court. But Merrell ignores entirely the impact of the Ninth Circuit's holding on the substantive law of the *other* states within the Circuit. The Opposition makes no attempt to show that the *Frye* rule embraced below would yield the same results in federal and state courts if an action similar to this case arose under the law of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, or Washington. In fact, *none* of these states employs the substantive *Frye* hurdle, and three of these states have specifically rejected it.[7]

The opinion below thus ensures that cases that would reach trial if heard in state court will be summarily dismissed in federal court under the Ninth Circuit's *Frye* rule. Such disparate results typify inequitable administration of the laws and encourage forum-shopping. In sum, the Ninth Circuit acted without regard or respect

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[6] *Bourjaily* held that Rule 104(a) does not license judges to utilize the common-law "bootstrapping doctrine" to exclude evidence otherwise admissible under the coconspirator exemption to the hearsay rule. Under the common law "bootstrapping doctrine," a coconspirator's statement had to be corroborated by independent evidence of a conspiracy before the statement would be considered admissible (i.e., an exception to the general prohibition on hearsay). Federal Rule of Evidence 801(d)(2)(E), however, mentions no requirement of independent evidence, and this Court held that the plain meaning of the rule forecloses any judicial imposition of such a requirement. *See Bourjaily*, 483 U.S. at 177-78. Similarly, in this case the plain language of Rules 702 and 703 does not authorize judicial creation of a "general acceptance" requirement.

[7] *See State v. Walters*, 806 P.2d 497, 501 (Mont. 1991) (reaffirming past rejection of the *Frye* test); *State v. Brown*, 687 P.2d 751, 759-60 (Or. 1984) (rejecting *Frye* test as unnecessarily restrictive); *Troutman v. Valley National Bank*, 826 P.2d 810, 815 n.2 (Ariz. Ct. App. 1992) (declining to follow *Frye*).

for the carefully considered substantive law of the States, by engrafting the additional substantive burden of *Frye* onto civil state-law tort litigation.[8] Such abuse of judicial power should be repudiated promptly by this Court.

In the end, Merrell's Opposition demonstrates nothing more than the existence of an argument in favor of the *Frye* rule. Bolstered by this Court's precedents, the plain meaning of the Federal Rules, separation-of-powers doctrine, and this Court's *Erie* jurisprudence, however, petitioners have outlined an opposing and powerful argument in favor of repudiating *Frye*. Taken together, then, the Petition and the Opposition simply demonstrate that the lines of analytic disagreement are clearly drawn and that this case is an excellent vehicle for this Court's review.

3. Certiorari is Warranted on the Peer Review Issue.

Typical of Merrell's overstatements is its claim that petitioners regard peer review as "the functional equivalent of some scholarly inquisition to burn the heretic and reward the devout." Opp. 25.[9] Petitioners argue no such thing. Peer review may be an efficacious

[8] Merrell's citation to *Hanna v. Plumer*, 380 U.S. 460 (1965), is entirely inapposite, as petitioners do not argue the invalidity of a procedural rule promulgated by this Court under the Rules Enabling Act. Instead, petitioners' argument under *Erie* attacks only the Ninth Circuit's use of the judicially created *Frye* and "peer review" tests *in addition to* the statutory standards set forth by Congress and by this Court in duly promulgated rules. Pet. 18-19, 25-26.

[9] Merrell's Opposition is replete with *ad hominem* attacks on the sincerity, professionalism and credibility of petitioners' experts. Merrell has characterized petitioners' experts as "scientific shamans" (Opp. 1), and "credentialed hired guns" (Opp. 14), who engage in "the pursuit of heresy" (Opp. 1), "unscrupulous hucksterism" (Opp. 11), "renegade reanalysis" (Opp. 23), and "pathological science" (Opp. 26) — all "performed at the request of litigants whose undisputed interest lies in finding a causative link." Opp. 25. Incendiary invective is no substitute for concrete analysis. As Judge Becker has noted, "[c]oncerns over 'hucksterism' and false science . . . are nothing new," and they should not affect analysis of whether *Frye* survives the Federal Rules of Evidence, enacted in 1975 — decades after such concerns were first expressed. Becker, *supra*, at 879 & n.117. Merrell's persistent emphasis on adjectives rather than arguments illustrates that it can marshall no legitimate position against a grant of certiorari. Merrell's verbal arsenal should be reserved for trial on the merits.

For the record, the Sixth Circuit, considering some of the same affidavits presented here, found "no suggestion of unethical scientific conduct" on the part of plaintiffs' experts. *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1352 (6th Cir. 1992). And it hardly needs emphasis that *Merrell's* expert witnesses were well compensated and did not testify out of a sense of philanthropy.

method for organizing the publication of academic journals, but it is not a surrogate for the truth-seeking function of civil and criminal justice. *See* Pet. 29-30. More fundamentally, nowhere has Congress delegated control over admissibility of scientific expert testimony to the editors of peer-reviewed journals, even if the peculiarly judicial function of deciding on the admissibility of trial evidence could be delegated to a private entity, *cf. Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935), and even if the First Amendment were not implicated by a "forced speech" rule that automatically devalues scientific studies unless they are published for public consumption and thereby penalizes a speaker who chooses to present her work only in the litigation context. *Cf. Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2824 (1992) (joint opinion); *Pacific Gas & Electric Co. v. Public Utility Comm'n of California*, 475 U.S. 1 (1986); *Wooley v. Maynard*, 430 U.S. 705 (1977).[10]

In an argument best directed to Congress, Merrell contends that without the *Frye* rule and peer review, "venal technocrats" will storm the barricades and overwhelm the mental faculties of unwitting jurors. Opp. 23. Apart from the obvious Seventh Amendment problem presented by this argument, *see* Pet. 14, 28-29 n.8, this Court has expressed little patience with such intellectual elitism about the capacities of jurors and of the adversarial system. It is the very "purpose of the jury . . . to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal." *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983) (internal quotation omitted).

Indeed, Merrell need not look far to find mechanisms for the "basic screening function to protect the jury from confusing and

[10] Among other things, the fact that peer-reviewed journals are themselves funded by drug companies like Merrell, *see* Pet. 30 n.10, makes it particularly objectionable for control over expert testimony in pharmaceuticals cases to be entrusted to the publication decisions of such journals. Any such delegation, given the "derivative bias" of the journals that must be assumed, *Schweiker v. McClure*, 456 U.S. 188, 196-97 (1982), infringes petitioners' right to "an impartial and disinterested tribunal" for decision of their claims. *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

misleading evidence." Opp. 14. A variety of tests for scrutinizing expert testimony at the admissibility stage have been authorized by Congress, *none* of which the Ninth Circuit below — in promulgating its *own* test — saw fit even to mention.[11]

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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[11] Although all relevant expert testimony is presumptively admissible, Fed. R. Evid. 402, courts must ensure that an expert is qualified and is addressing a subject on which expert testimony will be helpful to the jury. Fed. R. Evid. 702. Courts must ensure that, where an expert refers to hearsay information, that information is of the type reasonably relied upon by experts in the particular field in forming opinions on the subject. Fed. R. Evid. 703. Moreover, courts have been granted explicit authority under Fed. R. Evid. 706 to impanel independent experts to aid the jury in the factfinding process. *See, e.g.*, Becker, *supra*, at 884-85; T. Willging, *Court-Appointed Experts* (Fed. Jud. Ctr. 1986).

A court's ability to exclude evidence based on a balancing of probative and prejudicial value under Fed. R. Evid. 403 must also be considered. In his opinion in the *Christophersen* case, Chief Judge Clark emphasized that in assessing a trial court's exclusion of expert testimony it is imperative to consider all potentially applicable evidence rules enacted by Congress, including Rule 403, rather than to create "a homemade test for admissibility" under *Frye*, which ignores "the letter and spirit of the Federal Rules of Evidence." *Christophersen*, 939 F.2d at 1106, 1116, 1120-21 (Clark, C.J., concurring in the result).

Finally, various pretrial discovery and trial disclosure methods are available to strengthen the advocacy system by ensuring efficient and prepared cross-examination of experts at trial. *See, e.g.*, Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 483-85 (1986) (discussing selected tools); Pratt, *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 39 Wash. & Lee L. Rev. 313, 322-25 (1982) (same); Fed. R. Evid. 705 (authorizing trial courts to require prior disclosure of all underlying expert reasoning).

With the wide range of available devices deemed adequate by Congress for supervising expert testimony, it strains credulity to suggest that judges may invent their own devices based on a fear of "venal technocrats." The Ninth Circuit's imposition of additional, unwritten requirements — of "general acceptance" in an arbitrarily defined scientific community, and particularly of publication in a peer-reviewed journal — are inappropriate exercises of judicial power.